STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2008
v	No. 275683 Wayne Circuit Court
DARRUL LEE STOCKS, Defendant-Appellant.	LC No. 06-008107-01

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for two counts of second-degree child abuse, MCL 750.136b(3)(b). Defendant was sentenced to three years of probation. Because defendant was not denied the effective assistance of counsel and there was sufficient evidence to support a conviction for child abuse pertaining to defendant's son but not his daughter, we affirm in part and reverse in part.

Defendant's four- or five-year old son was found wandering in the street outside of his house during a neighborhood holiday celebration. He told a neighbor that his sister could not be awakened. Alarmed, the neighbor called 911. Paramedics who responded to the scene found defendant asleep in the house and were unable to wake him without shouting at him and eventually kicking his foot. One paramedic testified defendant smelled of alcohol. The paramedics also found defendant's baby daughter[1] strapped into a car seat next to defendant.

A police officer that responded to the scene arrested defendant and testified at trial that defendant was intoxicated. The officer also testified that the children were "obviously abused and neglected." He described defendant's daughter as having a dirty face, dirty fingernails, insects in her hair, and feces on her legs outside of her diaper, as well as on her car seat.

Defendant first argues on appeal that his convictions were not supported by sufficient evidence. We disagree with respect to defendant's son, but agree that there was insufficient evidence to convict defendant of second-degree child abuse concerning his daughter.

[1] The children's exact ages were not elicited at trial.

We review claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). To prove second-degree child abuse, the prosecutor must establish that (1) defendant is a parent or guardian of the victim, (2) the victim is under the age of 18, (3) defendant knowingly or intentionally committed an act, (4) likely to cause serious physical or mental harm, regardless of whether actual harm results or, (5) defendant's omission or reckless act causes serious physical or mental harm to the child. MCL 750.136b(3)(b); CJI2d 17.20a; see *People v Maynor*, 256 Mich App 238, 242; 662 NW2d 468 (2003), aff'd 470 Mich 289 (2004) (comparing first-degree child abuse with second-degree child abuse). It is a general intent crime. *Maynor*, *supra* at 242. Defendant does not dispute that he is the father of both children.

The basis for defendant's charges was that he knowingly or intentionally became intoxicated to the point that he was unable to properly watch after his children, placing them in harm's way. Defendant's wife testified that, when she left defendant only a few hours prior to the incident, he was asleep and not intoxicated. The paramedic, however, smelled alcohol on defendant and had to yell and kick defendant's foot to awaken him. The arresting officer also judged defendant to be intoxicated. On review for sufficiency of the evidence, we must draw all reasonable inferences in favor of the prosecutor and we must defer to the fact finder's role in determining the weight of the evidence and the credibility of the witnesses. *Tombs*, *supra* at 459; *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). A rational trier of fact could, as the trial court evidently did, believe the testimony of the paramedics and the officer and conclude from this evidence that defendant was intoxicated.

The presence of defendant's son in the street is sufficient evidence that defendant, due to his intoxication, was unable to protect his son from leaving the house and wandering the neighborhood. The trial court could rationally conclude that a four- or five-year old child is likely to encounter serious physical harm wandering in the street in the dark. Thus, there was sufficient evidence to prove that defendant's action in becoming intoxicated while responsible for his children was likely to cause his son serious physical or mental harm.

On the other hand, defendant's daughter was found inside the house strapped into her car seat. Despite her dirty condition, she did not appear to be in danger of any imminent serious harm.[2] The prosecutor is required to prove beyond a reasonable doubt that defendant's inability to respond to his children put them in likely danger of serious physical or mental harm. *Tombs*, *supra* at 459. "Likely" is defined as "probable" and requires something more than a mere possibility. See *Moll v Abbot Laboratories*, 444 Mich 1, 22; 506 NW2d 816 (1993). There was no evidence that defendant's intoxicated state would last for more than a period of hours or that his wife would not return after work. Defendant's daughter may have been too young to wander away from defendant while he was incapacitated and was, in fact, secured in a car seat next to

[2] Some representative examples of serious physical harm provided in the Criminal Jury Instructions are brain damage, fractured bones, sprains, internal injury, poisoning, and burns. CJI2d 17.20a.

defendant. The trial court nevertheless opined that "anybody can walk in and out of this house, and could have taken that child, abused that child in any way. . ." The trial court, then, based defendant's conviction for abuse of his infant daughter on a mere hypothetical possibility, not on a likelihood, that harm will occur. While the scenarios suggested by the trial court are possibilities, they are not necessarily probabilities, as is required for a conviction. There being insufficient evidence on which to convict defendant of second degree child abuse with respect to his daughter, that conviction must be reversed.

Defendant also argues on appeal that he received ineffective assistance of counsel. We disagree.

Because defendant did not request an evidentiary hearing or move for a new trial on the basis of ineffective counsel, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

Generally, counsel is presumed effective and the defendant must show that: (1) counsel's performance fell below an objectively reasonable standard, and (2) that defendant was so prejudiced by counsel's deficiency that there is a reasonable probability that, without the error, the outcome would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Further, the defendant must demonstrate that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to demonstrate an attorney's below-standard performance, a defendant must also overcome a strong presumption that the attorney's trial strategy was sound, even if the strategy is ultimately unsuccessful. *Id*. at 715. An appellate court will not substitute its judgment for defense counsel's on questions of trial strategy. *Id.*

Defendant cites the trial court's statement that its ruling against his motion for a directed verdict would have been different but for the performance of defense counsel. The trial court indicated that defense counsel's pointed questioning of the police officer regarding the basis for his arrest led the officer to make statements about the obvious neglect of the children. This, in turn, led the court to inquire into the foundation of these statements, leading to testimony regarding the dirty condition of defendant's daughter, to the detriment of defendant's case.

As a threshold matter, we cannot endorse admonishing trial counsel for vigorously pursuing any line of questioning that might possibly benefit counsel's client. As the court itself acknowledged, part of the officer's answer was non-responsive to counsel's question. And the testimony most harmful to defendant was actually elicited by the trial court's own question.

Further, there is nothing on the record to overcome the strong presumption that defense counsel's questioning constitutes sound trial strategy. *Rodgers*, *supra* at 715. The description by the officer was not raised previously on direct examination or in the officer's report. Defense counsel had no reason to suspect this description would be unearthed as he pursued a perceived weakness in the officer's testimony. The comments elicited were actually a result of the prosecutor's *objections* to defense counsel's line of questioning and the trial court's own questioning of the witness. This was an unintended and unexpected result of defense counsel's

strategy. Further, there is nothing fundamentally unfair about the introduction of additional witness testimony, elicited by the fact finder. *Id.* Despite the trial court's unfortunate assertion that this testimony was outcome determinative, defendant's attorney pursued a sound trial strategy and the unexpected results of the strategy did not threaten the fundamental fairness of defendant's trial.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Joel P. Hoesktra
/s/ Jane E. Markey